LIBRARY
SUPREME COURT, U. S.

FILED
OCT 16 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967
No. 729

SAMUEL RATNER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

Petition for a Writ of Certiorari to the Appellate Department of the Superior Court for the State of California, County of Los Angeles.

NORMAN R. ATKINS,
BURTON C. JACOBSON,
424 South Beverly Drive,
Beverly Hills, California,

RICHARD A. LAVINE,
121 South Beverly Drive,
Beverly Hills, California,
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

	Page
Opinions Below	1
Grounds on Which the Jurisidction of This Court Is Evoked	2
Questions Presented for Review	4
Constitutional Provisions and Statutes Involved	4
Statement of the Case	5
Description of the Material Involved	9
Reasons for Granting the Writ and Argument Amplifying Same	11
I. Certiorari Should Be Granted Because It Is the Announced Duty of This Honorable Court to Review All Decisions Wherein the Substantial Question of Free Expression Under the First Amendment of the United States Constitution Is Presented	11
II. Certiorari Should Be Granted Because the Highest Court of the State of California in Which a Decision Could Be Had in the Instant Matter Has Decided a Substantial Federal Question (First Amendment, United States Constitution) Not in Accord With Applicable Decisions of This Court	13
Conclusion	15

INDEX TO APPENDICES

	Page
Appendix A. Order Denying Rehearing and Granting Certification	1
Order Certifying Cause to Court of Appeal	2
Appendix B. Judgment	4
Appendix C. On Appeal—Criminal	5
Application for Certification to the District Court of Appeals	7
Points and Authorities in Support of Petition for Rehearing and in Support of Application for Certification to District Court of Appeals	9
Declaration of Burton C. Jacobson in Support of Petition for Rehearing and Application for Certification to the District Court of Appeals	22
Appendix D. Rule 63. Certification	23
Appendix E. Application Denied	24
Appendix F. Defendant's Designation of Record on Appeal, and Statement on Appeal	25
Appendix G. Appellant's Opening Brief	28

TABLE OF AUTHORITIES CITED

Cases	Page
A Quantity of Copies of Books v. Kansas, 87 S. Ct. 2104	12, 14
Aday v. United States, 87 S. Ct. 2095	12, 14
Alberts v. California, 354 U.S. 476, 77 S. Ct. 1304	4
Austin v. State of Kentucky, 87 S. Ct. 1414, 386 U.S. ....., 18 L. Ed. 515	12, 14
Avansino v. New York, 87 S. Ct. 2093	12, 14
Books, Inc. v. United States, 87 S. Ct. 2098	12, 14
Cobert v. New York, 87 S. Ct. 2092	12, 14
Corinth Publications, Inc. v. Westberry, 87 S. Ct. 2096	12, 14
Edwards v. People, 314 U.S. 160, 62 S. Ct. 164, 86 L. Ed. 119	4
Friedman v. New York, 87 S. Ct. 2091	12, 14
Gent v. State of Arkansas, 87 S. Ct. 1414, 386 U.S. ....., 18 L. Ed. 515	12, 14
Jacobellis v. Ohio, 378 U.S. 184, 84 S. Ct. 1676	11, 12, 13
Kenney v. State of New York, 87 S. Ct. 2091	12, 14
Kingsley International Pictures Corp. v. Regents, 360 U.S. 685	13
Landau v. Fording, 87 S. Ct. 2109	12, 14
Manual Enterprises, Inc. v. Day, 370 U.S. 478	13
Mazes v. Ohio, 87 S. Ct. 2105	12, 14
One, Inc. v. Olesen, 355 U.S. 371, 78 S. Ct. 364	13
Ratner v. California, 87 S. Ct. 2092	12, 14
Redrup v. State of New York, 87 S. Ct. 1414, 386 U.S. ....., 18 L. Ed. 515	12, 13

Page

Rosenbloom v. Virginia, 87 S. Ct. 2095 .....12, 14

Roth v. United States, 354 U.S. 486, 77 S. Ct. 1304 .....5, 6, 11

Schackman v. California, 87 S. Ct. 2107 .....12, 14

Sheperd v. New York, 87 S. Ct. 2093 .....12, 14

Smith v. People, 361 U.S. 147, 80 S. Ct. 215 4

Sunshine Book Co. v. Summerfield, 355 U.S. 372, 78 S. Ct. 365 13

Times Film Corp. v. Chicago, 355 U.S. 35, 78 S. Ct. 115 13

Zetlin v. Arnebergh, 59 Cal. 2d 901 13

Rules

California Rules of Court, Rule 63 3

Statutes

California Constitution, Art. VI, Sec. 4 .....3, 4

California Constitution, Art. VI, Sec. 4b 3, 4

California Constitution, Art. VI, Sec. 5 .....3, 4

California Penal Code, Sec. 311(a) 4, 5

California Penal Code, Sec. 311.2 .....4, 5

California Penal Code, Sec. 311.5 .....4, 5

California Penal Code, Sec. 1466 .....3, 4

United States Code Annotated, Title 28, Sec. 1257.. 3

United States Code Annotated, Title 28, Sec. 1257-(3) 4

United States Constitution, First Amendment ..4, 5, 6 .....7, 11, 12, 13

United States Constitution, Fourteenth Amendment 4

IN THE

Supreme Court of the United States

October Term, 1967
No. .....

SAMUEL RATNER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

Petition for a Writ of Certiorari to the Appellate Department of the Superior Court for the State of California, County of Los Angeles.

Petitioner, Samuel Ratner, respectfully prays for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, County of Los Angeles to review its judgment affirming the judgment of conviction of the Municipal Court for the El Monte Judicial District, County of Los Angeles, State of California, by which petitioner was sentenced to 180 days in the county jail of the County of Los Angeles on Counts 1, 2, and 3, all to run concurrently.

Opinions Below.

Trial in the Municipal Court, El Monte Judicial District, County of Los Angeles, State of California was by jury.

The Appellate Department of the Superior Court of the State of California for the County of Los Angeles affirmed the judgment of the Municipal Court

of the El Monte Judicial District, County of Los Angeles, State of California, without opinion.

A Petition for Rehearing and Application for Certification to the District Court of Appeal was timely made by petitioner, and on July 6, 1967, the Appellate Department of the Superior Court of the State of California for the County of Los Angeles made its orders denying the rehearing and granting the certification to the District Court of Appeal. The Orders denying the rehearing and certifying the cause to the Court of Appeals are appended hereto as Appendix "A".

Grounds on Which the Jurisdiction of This Court Is Evoked.

1. The date of the judgment sought to be reviewed is July 26, 1967. The time of entry of judgment is July 26, 1967.

2. Petitioner was convicted on the charges contained in Counts 1, 2, and 3 of a three-count complaint after jury verdict, which verdict was returned on October 18, 1966, and judgment thereon was entered on November 29, 1966, in the Municipal Court of the El Monte Judicial District, County of Los Angeles, State of California in the case captioned The People of the State of California, Plaintiff v. Samuel Ratner, Defendant and numbered M35295.

The petitioner then filed a timely notice of appeal in the Appellate Department of the Superior Court of the State of California, County of Los Angeles.

On June 8, 1967, the Appellate Department of the Superior Court of the State of California, County of Los Angeles, filed its judgment. (See Appendix "B").

Thereafter, petitioner filed a timely Petition for Rehearing and Application for Certification to the District Court of Appeal under the provisions of Rule 63 of the Rules on Transfer of Municipal and Justice Court appeals adopted by the Judicial Council of the State of California, effective January 2, 1962, appended hereto as Appendix "C". On July 6, 1967, the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, denied the petition for rehearing and granted the petitioner's application for certification to the District Court of Appeal. (See Appendix "A").

The District Court of Appeal of the State of California, Second Appellate District on July 26, 1967, denied the transfer of the cause to that Court. That denial is appended hereto as "Appendix "D". The Appellate Department of the Superior Court of the State of California for the County of Los Angeles thereby became the "highest court of a state in which a decision could be had" (28 U.S.C.A. §1257).

Under the law of the State of California, a convicted defendant charged with a misdemeanor in the Municipal Court of the State of California may appeal to the Appellate Department of the Superior Court, as a matter of right. California Penal Code §1466, California Constitution, Article VI, §§ 4, 4b and 5.

No further appeal is permitted under California law, unless done pursuant to the provisions of California Rules of Court, Chapter III, Rules on Transfer of Municipal and Justice Court Appeals. Rule 63 (See Appendix "D"). Application was made pursuant to said provision (appended herein as Appendix "C") and was denied as aforesaid (See Appendix "E"),

thereby rendering the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, the "highest court of a state in which a decision could be had." *Edwards v. People,* 314 U.S. 160, 171; 62 S. Ct. 164, 165; 86 L. Ed. 119; *Smith v. People,* 361 U.S. 147, 148, fn. 2; 80 S.Ct. 215, 216 fn. 2; *Alberts v. California,* 354 U.S. 476, 481, fn. 6; 77 S. Ct. 1304, 1307, fn. 6.

3. The statutory provision which confers jurisdiction upon this court to review the judgment in question by Writ of Certiorari is 28 U.S.C.A. §1257(3).

Questions Presented for Review.

1. Is the booklet "Bondage Cabin" (subject matter of Count 1) obscene, or is it entitled to the protection of the First Amendment of the United States Constitution?

2. Is the motion picture "The Count" (subject matter of Count 2) obscene, or is it entitled to the protection of the First Amendment of the United States Constitution?

3. Is the advertising brochure (subject matter of Count 3) capable of being legally construed to advertise obscene material, regardless of the material, as a matter of law, or is it entitled to the protection of the First Amendment of the United States Constitution?

Constitutional Provisions and Statutes Involved.

Involved are the First and Fourteenth Amendment to the United States Constitution; Section 311(a) of the California Penal Code; Section 311.2 of the California Penal Code; Section 311.5 of the California Penal Code; Section 1466 of the California Penal Code; and California Constitution, Article VI, Sections 4, 4b and 5.

Statement of the Case.

Petitioner was charged in a three count complaint. Count 1 charged that he distributed obscene material, to wit: a booklet entitled "Bondage Cabin" in violation of California Penal Code Section 311.2. Count 2 charged that he distributed obscene material, to wit: a motion picture film entitled "The Count" in violation of California Penal Code Section 311.2. Count 3 charged that he willfully and unlawfully wrote and created advertising and otherwise promoted the sale and distribution of matter represented and held out by him to be obscene in violation of Section 311.5 of the California Penal Code.

After jury trial, petitioner was found guilty on all three counts.

The Federal question as to whether the booklet "Bondage Cabin", the motion picture "The Count" and the advertising brochure are entitled to the protection of the First Amendment of the United States Constitution was first raised in the trial court by petitioner's (defendant below) plea of not guilty to the said three count complaint. The definition of obscenity contained in California Penal Code §311(a) and the definition of obscenity enunciated in *Roth v. United States,* 354 U.S. 486, 77 S. Ct. 1304, are exactly similar. By reason of petitioner's conviction on the three counts, it was implicit in that judgment that the material in Counts 1 and 2 constituted obscene material not only under California State Law but also under the definition of obscenity contained in *Roth v. United States, supra*; and the advertising brochure in Count 3 constituted the advertising of material represented to be obscene in the advertising not only under state law but

also under the definition of obscenity contained in *Roth v. United States, supra*; and were thereby all declared not to be entitled to the protection of the First Amendment of the United States Constitution.

Thereafter, petitioner appealed the conviction of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles. In petitioner's (defendant-appellant below) designation of record on appeal and statement on appeal (set out hereinafter as Appendix "F") at pages two and three thereof, petitioner set forth his grounds for appeal as follows:

> "The grounds upon which defendant relies:
>
> I
>
> The book entitled 'Bondage Cabin' upon which defendant was convicted in Count one of the amended complaint is not obscene as a matter of law, but rather is constitutionally protected material.
>
> II
>
> The motion picture film 'The Count' upon which defendant was convicted in Count Two of the amended complaint is not obscene as a matter of law, but rather is constitutionally protected material.
>
> III
>
> The advertising material which is the subject matter of Count Three cannot as a matter of law violate Section 311.5 of the Penal Code.
>
> IV
>
> The Court erred in failing to dismiss the action on the grounds that the material was constitutionally protected as a matter of law. . . ."

Petitioner also raised and presented the Federal question to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, at pages 2 and 5 of Appellant's Opening Brief (set out herein as Appendix "G") wherein appellant contended.

> "Penal Code Section 311.2 proscribes only obscene matter. If the underlying matter is not obscene, then no matter what else it might be, no crime has been committed, and the material is then protected by the First Amendment to the Constitution of the United States, and Article I, §9 of the Constitution of the State of California.
>
> "If the advertising brochure does not offer obscene material, no violation of Section 311.5 can occur. The material advertised is in no way connected with a violation of Section 311.5. It is only the advertising material itself which can constitute a violation of the statute. In other words, and to simply state the proposition, the defendant must advertise material which he represents to be obscene; and in order to do that, he must represent that his material is obscene as defined in Section 311(a) of the Penal Code."

On June 8, 1967, the Appellate Department of the Superior Court of the State of California for the County of Los Angeles affirmed the judgment of conviction by the Municipal Court, El Monte Judicial District, County of Los Angeles. (See Appendix "B")

Among the issues decided by that appeal was that the materials involved in Counts 1, 2 and 3 were not entitled to the protection of the First Amendment of the United States Constitution.

Thereafter, petitioner sought to have the said Appellate Department's decision reviewed by the California District Court of Appeal.

In petitioner's "Petition for Rehearing and Application for Certification to the District Court of Appeals" (set forth hereinafter as Appendix "C"), petitioner again brought to the attention of the Appellate Department the Federal question involved by stating at page 1 thereof as follows:

> "(a) The transfer of the instant case is necessary to secure uniformity of decision in that this court's affirming decision filed June 8, 1967 is contrary to the law of the State of California as expressed in *Zeitlin v. Arnebergh,* 59 Cal 2d 901; is contrary to the test of obscenity as contained in the Penal Code of the State of California, §311(a); and is contrary to the law of the United States of America as expressed in *Roth v. United States,* 354, U.S. 476; *One, Inc. v. Olesen,* 355 U.S. 371; *Times Film Corp. v. Chicago,* 355 U.S. 35; *Sunshine Book Co. v. Summerfield,* 355 U.S. 372; *Kingsley International Pictures Corp.. v. Regents,* 360 U.S. 684; *Manual Enterprises, Inc. v. Day,* 370 U.S. 478; *Jacobellis v. Ohio,* 84 S. Ct. 1676; *Tralins v. Gerstein,* 84 S. Ct. 1903; *Grove Press v. Gerstein,* 84 S. Ct. 190; *Winters v. New York,* 68 S. Ct. 665, and *Burstyn, Inc. v. Wilson,* 72 S. Ct. 777.
>
> "(b) To settle important questions of law involving the constitutional guarantees of freedom of speech and expression as contained in the United States Constitution, First and Fourteenth Amendments and the California Constitution, Article One, §9.

(1) Under the rule of law laid down in *Zeitlin v. Arnebergh,* 59 Cal. 2d 901, that only 'hard core pornography' is proscribed, what material is embraced within the term 'hard core pornography'?

(2) Does the material involved herein fall with the definition of the phrase 'hard core pornography'?

(3) What is the proper method of application of the definition of obscenity as contained in §311(2) of the Penal Code of the State of California?"

The Petition for Rehearing was denied by the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, but the Application for Certification to the District Court of Appeal was granted (See Appendix "A"), wherein it was recognized a necessity to "settle important questions of law and to secure uniformity of decision".

The District Court of Appeal on July 26, 1967 denied the certification of the case to itself, thereby rendering the judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, final, under the law of the State of California.

Description of the Material Involved

1. The booklet "Bondage Cabin" (which is the subject matter of Count 1) contains two stories. The first story is entitled "Bondage Cabin" and is the story of a girl who is captured by a man living a secluded existence, who keeps her tied up and treats her

as a slave, beating her from time to time. She eventually escapes and kills her tormentor, only to subsequently be captured by a person of the same ilk. There are no scenes describing sexual activity in any way, shape or form.

The second story is entitled "Flagella". It is the story of a man who stumbles upon a hidden and secret torture worshipping society. The man is subjected to torture of all types, only to come to the realization that he enjoys this mistreatment. This story contains no scenes of sexual activity.

2. The motion picture film "The Count" (the subject matter of Count 2) deals with a mad count who has two servant maids whom he ties up and beats for the slightest of causes. There is no sexual activity between the participants or actors in the film.

3. The advertising brochure (subject matter of Count 3) is a one-page advertising piece which lists for sale various items including the booklet involved in Count 1 and the film involved in Count 2. Other than listing the items for sale with a brief description thereof, it contains no other representations concerning the materials.

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING SAME.

I.

Certiorari Should Be Granted Because It Is the Announced Duty of This Honorable Court to Review All Decisions Wherein the Substantial Question of Free Expression Under the First Amendment of the United States Constitution Is Presented.

Petitioner relies on this Court's announced position with regard to the singular importance of ceaseless vigilance to safeguard and uphold the constitutional guarantee of free expression under the First Amendment of the United States Constitution. *Roth v. United States,* 354 U.S. 476, 488, 77 S. Ct. 1304, 1311.

As this Court stated most recently in *Jacobellis v. Ohio,* 378 U.S. 184, 188, 84 S. Ct. 1676, 1678:

> "Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicated an issue of constitutional law. See *Roth v. United States,* supra 354 U.S., at 497-498, S. Ct., at 1315-1316 (separate opinion). Such an issue, we think, must ultimately be decided by this court. Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.' Id., 354 U.S., at 498, 77 S. Ct. at 1316, *see Manual Enterprises, Inc. v. Day,* 370 U.S. 478, 82 S. Ct. 1432, 1437, 8 L. Ed. 2d 639 (Opinion of Harlan, J.):

And at page 1679, the Court stated:

"Hence we reaffirm the principle that, in obscenity cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected."

This Court has held that expression in the form of motion picture films is also within the ambit of the First Amendment guarantees, *Jacobellis v. State of Ohio, supra.*

See also

Redrup v. State of New York, 87 S. Ct. 1414, 386 U.S. ...., 18 L. Ed. 515; *Austin v. State of Kentucky,* 87 S. Ct. 1414, 386 U.S. ...., 18 L. Ed. 515; *Gent v. State of Arkansas,* 87 S. Ct. 1414, 386 U.S. ...., 18 L. Ed. 515; *Kenney v. State of New York,* 87 S. Ct. 2091, ... U.S. ....; *Friedman v. New York,* 87 S. Ct. 2091, *Ratner v. California,* 87 S. Ct. 2092; *Cobert v. New York,* 87 S. Ct. 2092; *Sheperd v. New York,* 87 S. Ct. 2093; *Avansino v. New York,* 87 S. Ct. 2093; *Aday v. United States,* 87 S. Ct. 2095; *Rosenbloom v. Virginia,* 87 S. Ct. 2095; *Corinth Publications, Inc. v. Westberry,* 87 S. Ct. 2096; *Books, Inc. v. United States,* 87 S. Ct. 2098; *A Quantity of Copies of Books v. Kansas,* 87 S. Ct. 2104; *Mazes v. Ohio,* 87 S. Ct. 2105; *Schackman v. California,* 87 S. Ct. 2107; *Landau v. Fording,* 87 S. Ct. 2109.

Petitioner most respectfully contends that these paramount and precious rights so derived should never be left with a local court their final arbiter. These First Amendment rights demand a constitutional judgment of the most sensitive type which must, when required, always be finally adjudicated by the United States Supreme Court.

II.

Certiorari Should Be Granted Because the Highest Court of the State of California in Which a Decision Could Be Had in the Instant Matter Has Decided a Substantial Federal Question (First Amendment, United States Constitution) Not in Accord With Applicable Decisions of This Court.

Petitioner contends that independent review by this honorable court is required because the materials involved herein, when tested by a proper application of constitutional standards and compared with the subject matter of the following cited cases, is clearly not obscene.

Times Film Corp. v. Chicago, 355 U.S. 35, 78 S. Ct. 115;

One, Inc. v. Olesen, 355 U.S. 371, 78 S. Ct. 364;

Sunshine Book Co. v. Summerfield, 355 U.S. 372, 78 S. Ct. 365;

Kingsley International Pictures Corp. v. Regents, 360 U.S. 685;

Manual Enterprises, Inc. v. Day, 370 U.S. 478;

Jacobellis v. Ohio, supra;

Zeitlin v. Arnebergh, 59 Cal. 2d 901;

Redrup v. State of New York, 87 S. Ct. 1414, 386 U.S. ...., 18 L. Ed. 515;

Austin v. State of Kentucky, 87 S. Ct. 1414, 386 U.S. ...., 18 L. Ed. 515;

Gent v. Arkansas, 87 S. Ct. 1414, 386 U.S. ...., 18 L. Ed. 515;

Kenney v. State of New York, 87 S. Ct., 2091 ....U.S.....;

Friedman v. New York, 87 S. Ct. 2091;

Ratner v. California, 87 S. Ct. 2092;

Cobert v. New York, 87 S. Ct. 2092;

Sheperd v. New York, 87 S. Ct. 2093;

Avansino v. New York, 87 S. Ct. 2093;

Aday v. United States, 87 S. Ct. 2095;

Rosenbloom v. Virginia, 87 S. Ct. 2095;

Corinth Publications, Inc. v. Westberry, 87 S. Ct. 2096;

Books, Inc. v. United States, 87 S. Ct. 2098;

A Quantity of Copies of Books v. Kansas, 87 S. Ct. 2104;

Mazes v. Ohio, 87 S. Ct. 2105;

Schackman v. California, 87 S. Ct. 2107;

Landau v. Fording, 87 S. Ct. 2109.

Petitioner respectfully points out that the materials here involved are precisely similar to the materials in *Friedman v. New York, supra.*

In spite of the above, the materials here involved have been suppressed by the Appellate Department of the Superior Court of the State of California for the County of Los Angeles. Petitioner has been convicted and sentenced to jail for disseminating and advertising material which clearly cannot constitutionally be proscribed.

Conclusion.

The petition for a writ of certiorari should be granted and the decision reversed.

Respectfully submitted,

NORMAN R. ATKINS,
BURTON C. JACOBSON,
RICHARD A. LAVINE,
Attorneys for Petitioner.